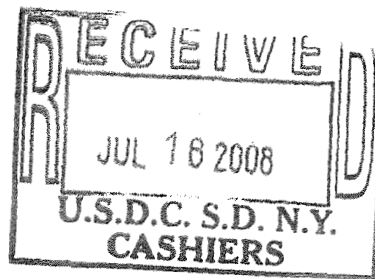


JUDGE ROBINSON

08 CV 6369
COPY

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
By: JOSEPH A. PANTOJA
86 Chambers Street – 3rd Floor
New York, New York 10007
Tel.: (212) 637-2785
Fax: (212) 637-2750
E-mail: joseph.pantoja@usdoj.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- x ECF Case
UNITED STATES OF AMERICA, :
Plaintiff, :
-against- :
CITY OF MIDDLETOWN, :
Defendant. : COMPLAINT
----- x

No. 08 Civ. _____ ()

The United States of America, by authority of the Attorney General of the United States and through the undersigned attorney, acting at the request of the Administrator of the United States Environmental Protection Agency ("Administrator"), for its complaint against the City of Middletown, acting on behalf of the City of Middletown Water Department, alleges as follows:

NATURE OF THE ACTION

1. This is a civil action under Section 1414(b) of the Safe Drinking Water Act, 42 U.S.C. 300f, et seq. ("SDWA"), seeking injunctive relief and the assessment of civil penalties against Defendant for a violation of the SDWA implementing regulations and for missing a deadline in an Administrative Order issued by the Environmental Protection Agency ("EPA") in 2004. Specifically, the City of Middletown is the owner and operator of the City of Middletown Water Department, a public water system that provides drinking water to approximately 26,200

customers. Defendant violated the Interim Enhanced Surface Water Treatment Rule, found at 40 C.F.R. Part 141, Subpart P; 40 C.F.R. §§ 141.170-141.175 ("IESWTR"), and specifically failed to comply with the February 28, 2006 deadline, set in an Administrative Order issued by EPA against the City of Middletown ("City") on March 31, 2004, to issue a notice to proceed in connection with the construction of a full scale water treatment plant to replace the existing, inadequate Monhagen Water Treatment Plant.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the parties and the subject matter of this action under 28 U.S.C. §§ 1331, 1345, and 1355, Section 1414(b) and (g)(3)(C) of the SDWA, 42 U.S.C. §§ 300g-3(b) and (g)(3)(C). This Court has personal jurisdiction over the Defendant because the Defendant is located in this district.

3. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (c) and 1395(a), and SDWA Section 1414(g)(3)(C), 42 U.S.C. § 300g-3(b)(3)(C), because the Defendant is located in this district and the events or omissions giving rise to this action occurred in this district.

PARTIES

4. Plaintiff is the United States of America, acting by the authority of the Attorney General and on behalf of the Administrator of the EPA.

5. The City of Middletown, a political subdivision of the State of New York, was duly formed under the laws of the State of New York, and is a "municipality" and a "person" within the meaning of Section 1401 of the SDWA, 42 U.S.C. § 300f(10) and (12). The City of Middletown owns and operates the City of Middletown Water Department.

STATUTORY AND REGULATORY BACKGROUND

6. Section 1401(4) of the SDWA, 42 U.S.C. § 300f(4), and 40 C.F.R. § 141.2, define “public water system” as a “system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals.”

7. Section 1401(5) of the Act, 42 U.S.C. § 300f(5), and 40 C.F.R. § 141.2, define “supplier of water” as “any person who owns or operates a public water system.”

8. Under Section 1411 of the SDWA, 42 U.S.C. § 300g, the owner or operator of a public water system must comply with National Primary Drinking Water Regulations promulgated under Part B of the Act, 42 U.S.C. §§ 300g-300g-6 (“NPDWR”), except to the extent an exception, variance or exemption under Sections 1411, 1415, or 1416, 42 U.S.C. §§ 300g, 300g-4, or 300g-5, is applicable. The NPDWR govern the contaminant limitations, monitoring requirements, public notification requirements, and other requirements for regulated drinking water systems.

9. Section 1412(b)(2)(C) of the SDWA, 42 U.S.C. § 300g-1(b)(2)(C), specifically directs EPA to promulgate an IESWTR. On December 16, 1998, EPA promulgated the IESWTR, found at 40 C.F.R. Part 141, Subpart P; 40 C.F.R. §§ 141.170-141.175 (“IESWTR”). The IESWTR was published in the Federal Register. *See* 63 Fed. Reg. 69478 (December 16, 1998). The requirements of the IESWTR, which became effective February 16, 1999, constitute a National Primary Drinking Water Regulation and an applicable requirement of the SDWA.

10. The IESWTR is intended to provide increased public health protection from microbial pathogens, particularly *Cryptosporidium*. The IESWTR builds upon existing treatment technique requirements established by the 1989 Surface Water Treatment Rule, by

requiring systems using conventional and direct filtration to comply with strengthened turbidity standards and to conduct continuous monitoring of individual filter effluent turbidity.

11. On January 1, 2002, all public water systems that served 10,000 or more people and used surface water or ground water under the direct influence of surface water were required to comply with, *inter alia*, the requirements of the IESWTR. See 40 C.F.R. § 141.170(a).

12. The New York State Department of Health (“NYSDOH”) administers the Public Water Supply Supervision Program in New York pursuant to Section 1413 of the SDWA, 42 U.S.C. § 300g-2, and was delegated primary enforcement authority for the IESWTR on January 5, 2007.

13. Section 1414(b) of the SDWA, 42 U.S.C. § 300g-3(b), authorizes the Administrator to commence a civil action for injunctive relief and civil penalties for violations of any applicable requirement under the SDWA, if authorized under Section 1414(a)(2) of the SDWA, 42 U.S.C. § 300g-3(a)(2), and in other specified circumstances. Section 1414(a)(2)(A) of the SDWA, 42 U.S.C. § 300g-3(a)(2)(A), authorizes the Administrator to bring such an action if the Administrator finds, with respect to a period in which a State does not have primary enforcement responsibility for the public water system, that the public water system does not comply with an applicable requirement under the SDWA. The term “applicable requirement” includes a “schedule or requirement” imposed pursuant to, *inter alia*, 42 U.S.C. § 300g-3. See 42 U.S.C. § 300g-3(i)(1) and (3). Section 1414(b) of the SDWA, 42 U.S.C. § 300g-3(b), authorizes the Administrator to seek civil penalties of up to \$32,500 per day for each violation pursuant to the Debt Collection Improvement Act of 1996, Pub. L. 104-134 (1996) and EPA’s Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121 (February 13, 2004).

GENERAL ALLEGATIONS

14. The City of Middletown owns and operates the City of Middletown Water Department, a “public water system” within the meaning of the SDWA and the regulations. The City’s public water system utilizes a surface water source to supply approximately 26,200 customers through at least 15 service connections including residential, commercial, and other facilities in the City.

15. As the owner and operator of a public water system, the City must comply with all National Primary Drinking Water Regulations promulgated under Part B of the SDWA, 42 U.S.C. §§ 300g-300g-6. None of the exceptions in Section 1411, U.S.C. § 300g are applicable.

16. The City does not have a variance or exemption from the IESWTR pursuant to Sections 1415 or 1416 of the SDWA, 42 U.S.C. §§ 300g-4 or 300g-5, for any part of its public water system.

17. The City’s public water system utilizes a surface water source and serves more than 10,000 persons and, therefore, was required to comply with the IESWTR beginning January 1, 2002.

18. In a letter dated December 29, 2003, the City advised the EPA of a long-term schedule for the design and construction of a full scale water treatment plant to replace the inadequate Monhagen Plant and come into compliance with the IESWTR. The schedule included a February 28, 2006 deadline for the City’s issuance of a notice to proceed with the construction of the new plant. Based on that schedule, on March 31, 2004, EPA issued an Administrative Order (Docket Number SDWA-02-2004-8123) establishing an enforceable, long-term schedule for compliance with the IESWTR through the design and construction of a full scale water treatment plant to replace the inadequate Monhagen Plant (“2004 Administrative

Order”), including a deadline of February 28, 2006, for the City to issue a notice to proceed with the construction of the new plant.

19. EPA initially learned that the City would not be able to comply with the notice-to-proceed milestone in the 2004 Administrative Order from the City’s quarterly progress report dated January 13, 2006. By letter dated February 28, 2006, the City formally informed EPA that the notice-to-proceed milestone would not be met, and that the City had implemented a process to evaluate cost-saving measures prior to proceeding with construction.

20. Pursuant to 42 U.S.C. § 300g-3(a)(2)(B), before commencing suit in this Court, the Administrator notified an appropriate local elected official with jurisdiction over the City’s public water system of the EPA’s intention to seek judicial relief in connection with Defendant’s failure to comply with the long-term compliance schedule in the 2004 Administrative Order.

CLAIM FOR RELIEF

21. Paragraphs 1 through 20 are realleged and reincorporated by reference.

22. Because Defendant failed to comply with the February 28, 2006 deadline for issuing a notice to proceed in connection with the design and construction of a full-scale water treatment plant, which deadline was set in the 2004 Administrative Order issued by the EPA against Defendant pursuant to 42 U.S.C. § 300g-3(g), Defendant has violated and continues to violate the 2004 Administrative Order and the implementing regulations of the SDWA.

23. Defendant will continue to violate the 2004 Administrative Order and the implementing regulations of the SDWA unless enjoined. Protection of the public health requires that Defendant be enjoined to comply with the requirements set forth in the 2004 Administrative Order and the implementing regulations of the SDWA.

PRAYER FOR RELIEF

WHEREFORE, the United States of America, respectfully requests that this Court:

1. Enjoin Defendant from violating the SDWA and the IESWTR, and the 2004 Administrative Order, including but not limited to the filtration, monitoring and reporting requirements of the rule;
2. Order Defendant to site, design, construct, and operate a filtration plant on an expeditious schedule and to comply with the filtration and disinfection requirements set forth in 40 C.F.R. §§ 141.72, 141.73, 141.170, 141.173, and 141.174 as well as the monitoring and reporting requirements set forth in 40 C.F.R. §§ 141.74, 141.75, and 141.175;
3. Order Defendant to implement such further interim and long term measures as may be required to protect the public health;
4. Order Defendant to pay a civil penalty, pursuant to Section 1414(b) of the Act, 42 U.S.C. §300g-3(b), of up to \$32,500 for each day for which Defendant has failed to comply with the schedule set forth in the 2004 Administrative Order, together with interest accruing from the Date of Lodging, at the rate specified in 28 U.S.C. § 1961 as of the Date of Lodging.
5. Award the United States its costs in this action; and

6. Grant such other and further relief as the Court deems appropriate.

Dated: New York, New York
July , 2008

THE UNITED STATES OF AMERICA

ELLEN M. MAHAN
Deputy Chief
Environment and Natural Resources Division
United States Department of Justice

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
Attorney for Plaintiff

By: JOSEPH A. PANTOJA
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel.: (212) 637-2785
Fax: (212) 637-2750